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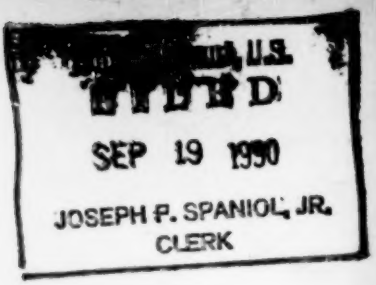

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DAVID J. LAURICK; Petitioner,

vs

STATE OF NEW JERSEY; Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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81

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WHO, ADMITTEDLY NEVER MADE AN EFFECTIVE WAIVER OF HIS RIGHT TO COUNSEL, IS ENTITLED TO COMPLETE EXCLUSION OF THE PRIOR PLEA, WHERE THE STATE SEEKS TO USE THE PRIOR IMPROPER PLEA TO ENHANCE THE PENALTIES OF ANOTHER OFFENSE?

Yes.

2. WHETHER IT IS IMPROPER FOR A COURT TO PLACE THE BURDEN UPON THE DEFENDANT, WHO ASSERTS THAT HE WAS IMPROPERLY ADVISED ON A PRIOR OFFENSE, OF PROOF THAT THE DEFENDANT WAS ACTUALLY PREJUDICED BY THE UNCOUNSELED PLEA?

Yes.

3. WHETHER IT IS IMPROPER FOR THE STATE TO APPEAL A SENTENCE THAT WAS NOT OBJECTED TO BY THE STATE WHEN THE PETITIONER WAS SENTENCED?

Yes.

LIST OF PARTIES BEFORE NEW JERSEY SUPREME COURT

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TABLE OF CONTENTS

JURISDICTION 1

STATEMENT OF THE CASE 2

1. WHETHER THE PETITIONER WHO, ADMITTEDLY NEVER MADE AN EFFECTIVE WAIVER OF HIS RIGHT TO COUNSEL, IS ENTITLED TO COMPLETE EXCLUSION OF THE PRIOR PLEA, WHERE THE STATE SEEKS TO USE THE PRIOR IMPROPER PLEA TO ENHANCE THE PENALTIES OF ANOTHER OFFENSE? 7

2. WHETHER IT IS IMPROPER FOR A COURT TO PLACE THE BURDEN UPON THE DEFENDANT, WHO ASSERTS THAT HE WAS IMPROPERLY ADVISED ON A PRIOR OFFENSE, OF PROOF THAT THE DEFENDANT WAS ACTUALLY PREJUDICED BY THE UNCOUNSELED PLEA? 12

3. WHETHER IT IS IMPROPER FOR THE STATE TO APPEAL A SENTENCE THAT WAS NOT OBJECTED TO BY THE STATE WHEN THE PETITIONER WAS SENTENCED? 14

TABLE OF AUTHORITIES

United States Supreme Court:

Baldasar v Illinois, 446 US 222,
64 L Ed 2d 169 (1980) 6,11,13

Burgett v Texas, 389 US 109,
19 L Ed 2d 319 (1967) 9

Faretta v. California, 422 U.S. 806,
807 (1975) 7,8

Johnson v Zerbst, 304 US 458,
82 L Ed 1461 (1938) 7

Kirby v Illinois, 406 US 682,
32 L Ed 2d 411 (1972) 7

McKaskle v Wiggins, 465 US 168,
79 L Ed 2d 122 (1984) 9

South Dakota v Neville, 459 US 553,
558 (1983) 5

United States v Tucker, 404 US 443,
30 L Ed 2d 592 (1972) 12,14

Von Moltke v Gillies, 332 US 708, 723,
92 L Ed 309 (1948) 9

New Jersey Caselaw:

Rodriguez v Rosenblatt, Et. al., 58 N.J. 281 (1971) 5

State v. Carey, 230 N.J. Super. 402 (A.D. 1989) 5

State v Davis, 45 NJ 195 (1965) 9

State v. Fusco, 93 N.J. 578, 583 (1983) 7

State v Guerin, 208 NJ Super 527 (A.D. 1986) 9,10

State v Hamm, N.J. (1990) 6

State v. Laurick 231 N.J. Super. 464 (App. Div. 1989) 3,5,8,12

State v Tishio, 107 NJ 504 (1987) 5

United States Code:

28 USC Sec. 1257(2) 1

28 USC Sec. 2403(b) 1

New Jersey Statuted Annotated:

N.J.S.A. 39:4-50 . . . . . Ibid

New Jersey Rules of Criminal Practice:

Rule 7:4-5(a) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DAVID J. LAURICK; PETITIONER,

VS

STATE OF NEW JERSEY; RESPONDENT.

JURISDICTIONAL STATEMENT

Appellant, David Laurick, appeals from the final judgment of the Supreme Court of New Jersey, entered on June, 1990 granting the State's request to deny the trial court's order that the petitioner be sentenced as a first offender, for violation of N.J.S.A. 39:4-50.

Petitioner asserts that the New Jersey Supreme Court improperly interprets this Court's determination of the petitioners Sixth Amendment right to not have a previously uncounseled offense used against to enhance the penalties of the present offense.

Additionally, petitioner asserts that the New Jersey Supreme Court places an improper burden upon petitioner by requiring the petitioner to prove his innocence.

Finally, the petitioner asserts that it violated procedural due process to allow the State to appeal a decision the State did not object to.

1. Herein after noted as petitioner.

JURISDICTION

The judgment of the New Jersey Supreme Court granting the State's appeal and ordering that the defendant be resentenced in accordance with the Court's opinion was ordered on June 21, 1990.

The notice of appeal to this Court was filed within 90 days of the final judgment below.

The jurisdiction of this Court is invoked under 28 USC Sec 1257(2). Petitioner believes that 28 USC Sec 2403(b) applies and complies with same.

The issues presented are questions of first impression before this Court regarding the affect that an improper waiver of counsel has on noncustodial sentences and in terms of recidivist DWI statutes with serious consequences. The petitioner asserts that the questions presented have nationwide significance.

The questions presented present novel issues of interpretation of the federal constitution. Petitioner asserts that the various interpretations by Courts across the country of recidivist statutes cries out for this Court to interpret the affect that the failure to advise of counsel has within the framework of these statutes.

The petitioner will rely upon the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. [1]

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1. For the full text of the provisions relied upon by the petitioner see PA-54.

STATEMENT OF THE CASE

On or about September, 1985, petitioner was charged in North Hanover Township with a violation of N.J.S.A. 39:4-50. petitioner's breath test on a National Drager Breathalyzer, Model 900. He unsuccessfully challenged use of the admissibility of the results of tests performed on said machine as evidence against him. After the denial of his motion to supress the breathalyzer test results, the petitioner entered a conditional guilty plea, preserving the right to appeal the issue of whether the breathalyzer results were admissible against him. At the June 22, 1987 sentencing hearing in the above entitled matter, petitioner testified that he was not represented by counsel in 1982 when he entered a guilty plea to a violation of N.J.S.A. 39:4-50. (See PA-40). He further testified that he did not know at the time of the 1982 plea that he had an absolute right to have an attorney represent him in that action. (See PA-40). Finally, he testified that the judge who accepted his 1982 guilty plea did not inform him of, and that he was not aware of, the future consequences that his guilty plea could have. (See PA-41). Although the prosecuting attorney cross-examined the petitioner, the State offered no evidence in opposition to the petitioner's testimony. (See PA-42 to PA-43) Judge Haines found that the petitioner did not validly waive his right to counsel at his 1982 trial. The trial court sentenced petitioner as a first offender, imposing a minimum sentence of $250.00 fine, a $100.00 surcharge, 12 hours in the Driver Resource Center, no term of imprisonment, a forfeiture of his driving privilege for a period of six months and $15.00 costs. (See PA-44). The petitioner appealed the issue of whether the breathallyzer results taken on a Draeger Breathalyzer, Model 900 were admissible as evidence against him. The State cross-appealed the issue of whether the petitioner

should be sentenced as a first offender because his right to counsel was violated at his 1982 trial. The Appealate Division held that the petitioner's 1982 uncounseled conviction could not be used for enhancement purposes, because he had not been advised of his right to counsel at said proceedings. State v. Laurick 231 N.J. Super. 464 (App. Div. 1989). On March 20, 1989, the State filed a Notice of Petition for Certification, seeking to challenge the Appellate Division's affirmance of the trial court's sentencing of petitioner as a first, rather than a second offender. On May 4, 1989, the Court granted the State's petition.

On June 8, 1989, the State filed a motion seeking both to file a supplemental merits brief and also to expand the record in this matter. The State sought to expand the record to include statistical information concerning the number and percentage of drunk driving convictions which are entered against recidivist offenders, and, if it could be determined, to include statistical information concerning the percentage of recidivist offenders who had a prior conviction which was at least three years old at the time of the subsequent conviction. In orders filed June 29, 1989, the New Jersey Supreme Court granted the State's applications both to expand the record and to file a supplemental merits brief.

The State filed its Supplemental Merits Brief on or about August 14, 1989.

On or about August 28, 1989, the petitioner filed a motion for an order allowing him (1) to file a Supplemental Merits Brief in response to the State's Supplemental Merits and (2) expanding the time in which the petitioner may move to supplement the record with various documents.

On or about September 21, 1989, the Supreme Court granted both of petitioner's requests.

The petitioner was arrested on September 4, 1985. The Petitioner was charged with driving under the influence of alcohol.

The petitioner was previously charged with a violation of N.J.S.A. 39:4-50 in 1982. In connection with the 1982 charge, the petitioner appeared in the Plumsted Township Municipal Court only once, at which time he entered a guilty plea. At the time of his 1982 appearance the petitioner was not represented by an attorney. When the petitioner entered a guilty plea to the the 1982 charge of violating N.J.S.A. 39:4-50, the presiding judge did not advise him that he had a right to an attorney to assist him in making his defense to the charge against him. In addition, the presiding judge, who accepted the petitioner's guilty plea to the 1982 charge, did not explain any of the future consequences that the petitioner's guilty plea and attendant conviction would have. At the time the petitioner entered his guilty plea to the 1982 charge, he did not know what effect his guilty plea would have if he were charged with a violation of N.J.S.A. 39:4-50 a second time. The petitioner did not know what effect his guilty plea would have if he were charged with a violation of the same statute a third time. Although petitioner was aware he was on the revoked list as a result of his 1982 conviction, he was not aware of the penalty that would be imposed if he was caught driving on the revoked list during that time. Finally, at the time of his 1982 appearance and conviction, the petitioner did not know that if he had an accident while driving on the revoked list, he would be subject to a mandatory 45 day jail term, regardless of his fault in causing the accident. See N.J.S.A. 39:3-40.

The State offered no testimony or other evidence in opposition to the petitioner's testimony.

Judge Haines, the trial court, sentenced petitioner as a

first offender. The trial court did not enhance any of the penalties the petitioner faced.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court "has repeatedly lamented the tragedy" of the "carnage caused by drunk drivers." South Dakota v Neville, 459 US 553, 558 (1983). In attempting to facilitate, by whatever means, easy drunk driving convictions through strained interpretation of legislative intent, the New Jersey Supreme Court has overreacted to this Court's pleas. See also State v Tishio, 107 NJ 504 (1987).

The New Jersey Appellate Division in a well reasoned opinion indicated that due to the States policy of offering an attorney to anyone facing a "consequence of magnititude" no plea of guilty should be used against a defendant where the defendant was not properly advised by the previous trial court of defendant's right to an attorney. State v. Laurick 231 N.J. Super., supra. at PA-16. The Appellate Court followed existing caselaw found at State v. Carey, 230 N.J. Super. 402 (A.D. 1989). The Appellate Court based its decision upon the New Jersey Supreme Court's previous determination to liberally grant the State's citizens a right to a Court appointed attorney which occured in Rodriguez v Rosenblatt, Et. al., 58 N.J. 281 (1971).

The petitioner asserts, and the New Jersey Supreme Court aggrees, that the penalties he faced constitute a consequence of magnitude. Recently, the New Jersey

Supreme court indicated that,

> Nor will we seek to trivialize the license revocation by an outworn distinction between rights and privileges. Anyone who thinks it is a governmental privilege to drive a car in New Jersey has only to exp0erience the life of a suburban homemaker providing transportation for almost all of life's necessities, or the life of a salesperson trying to call on customers in far-flung shopping or industrial malls. A license to drive is not a privilege, it is nearly a necessity. And its deprivation is clearly a 'consequence of magnitude.' State v Hamm, N.J. (1990), slip opinion at 19.

It is against the backdrop of the above statement that the New Jersey Supreme Court indicated that Baldasar v Illinois, 446 US 222, 64 L Ed 2d 169 (1980) only precludes the enhancement of incarceration, rather then precluding the use of the improper plea against the defendant to enhance all aspects of later sentence.

Petitioner asserts that Baldasar precludes enhancement of all the various penalties, if petitioner was not properly advised of his right to counsel. Particularly, in todays world, where a drivers license becomes one of necessity, rather then administrative priviledge, as even the New Jersey Supreme Court admits.

Petitioner requests that this Court clear up the misconception surrounding the right to counsel, within the framework of a invalid plea. Petitioner, request that it is time for this Court to consider whether a serious loss of drivers license, invokes the protections of counsel within the framework of advisements to a defendant who allegedly wants to plead guilty to the most serious offense most people face in their life, a drunk driving charge. It is asserted that in New Jersey today, an alleged drug

possessor, an alleged thief, an alleged aggrevated assault defendant all have more constitutional rights, then does the alleged drunk driver, the alleged lowest form of life on earth.

1. WHETHER THE PETITIONER WHO, ADMITTEDLY NEVER MADE AN EFFECTIVE WAIVER OF HIS RIGHT TO COUNSEL, IS ENTITLED TO COMPLETE EXCLUSION OF THE PRIOR PLEA, WHERE THE STATE SEEKS TO USE THE PRIOR IMPROPER PLEA TO ENHANCE THE PENALTIES OF ANOTHER OFFENSE?

Yes. The Sixth Amendment entitles petitioner to not have an improper plea used against the petitioner in any manner.

The Sixth Amendment as applied to the states through the Fourteenth Amendment guarantees an accused the right to have the assistance of counsel in order to protect his fundamental right to a fair trial. Faretta v. California, 422 U.S. 806, 807 (1975); State v. Fusco, 93 N.J. 578, 583 (1983). The federal guarantee of the right to counsel has been found to arise from the

> ... recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life, or liberty, wherein the prosecution is represented by experienced and learned counsel. Johnson v Zerbst, 304 US 458, 82 L Ed 1461 (1938).

The assistance of counsel is necessary to ensure fairness and due process in criminal proceedings. A convicted defendant cannot suffer imprisonment unless counsel was available to him at every critical stage of the adversarial process. Kirby v Illinois, 406 US 682, 32 L Ed

2d 411 (1972).

A defendant does have the right to conduct his own defense, provided that he knowingly and intelligently waives his right to counsel. Faretta v. California, supra. at 835. However, as in the present case, the responsibility of ensuring that a defendant's choice of self-representation is made knowingly and intelligently rests with the trial court. This responsibility is defined by the Supreme Court in Faretta,

> Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Id. at 835.

Courts are to indulge every reasonable presumption against the waiver of fundamental constitutional rights and will not presume their loss. The New Jersey Supreme Court agreed with the premise that you cannot presume that any court properly advised any defendant. State v Laurick, NJ (1990), see Pa-8.

Although, petitioner would indicate, that this language indicates that the New Jersey Supreme Court does not really understand the burdens upon a trial court, when accepting an uncounseled plea. The record in this case is truly silent, but for petitioners testimony. There is no transcript available to see exactly what was said between both the defendant, petitioner and the previous trial court.[1]

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1. Rule 7:4-5(a) requires that the Municipal Court (the trial court in this case) only keep recording of the plea for three years. However, any person may be a recidivist for violation of N.J.S.A. 39:4-50 for 19 years 364 days. Petitioner will focus on this more indepthly at issue 2 below.

There is no judgment of conviction available to indicate whether or not the defendant, petitioner was properly advised. "[P]resuming waiver of counsel from a silent record is impermissible. Carnley v Cochran, 369 US 506, 8 L Ed 2d 70; as cited in Burgett v Texas, 389 US 109, 19 L Ed 2d 319 (1967).[1]

In deciding whether there was an effective waiver of counsel the trial court must:

> ... investigate as long and as thoroughly as the circumstances of the case before him demand. . . To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. Von Moltke v Gillies, 332 US 708, 723, 92 L Ed 309 (1948).

Once the defendant has been advised, in unequivocal terms, of the technical problems he might encounter and of the risks he takes should his efforts be unsuccessful, if he still wishes "to waive his right to counsel, he should be permitted to conduct his own defense ..." State v Guerin, 208 NJ Super 527, 536 (A.D. 1986); State v Davis, 45 NJ 195 (1965). See also McKaskle v Wiggins, 465 US

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1. Petitioner asserts that all of the following must be present to indicate a valid guilty plea. One, if the defendant is not represented, and advisement of the availability of counsel; Two, waiver of counsel on the record; Three, waiver of right against self incrimination; Four, waiver of right to confront witnesses; Five, explanation of the immediate affect of the guilty plea; Six, Advisement of the later consequences of a fuilty plea, including the enhanced subsequent penalties; Finally, an explanation of the nature of the charge, including possible pleas and possible defenses available.

168, 79 L Ed 2d 122 (1984).

If the trial court fails to make the required inquiries or to advise the defendant of the advantages and disadvantages of self-representation, neither the trial court nor a reviewing court can be sure that the defendant "knew what he was doing and is choice was made with eyes open." State v Guerin, supra. at 535. If such a case presents itself, notwithstanding the proof of defendant's guilt, the Appellate Division will reverse the defendant's convictions and remand the matter for a new trial. Id. at 529, 535.

In the present case the New Jersey Supreme Court chooses to rest it's determination on labeling of words rather then constitutional precepts.

However, the New Jersey Supreme Court agrees with the premise that a prior improperly accepted plea should not be used against the defendant, but only as it applies to incarceration. State v Laurick, supra. at Pa-8. The theory of the New Jersey Supreme Court is since there was no **constitutional right** to counsel, there is no constitutional right to be advised that anyone can retain counsel, thus there was no constitutional defect, or fundamental injustice. Thus, the only "constitutional limit" for one who was not properly advised in the prior plea, is to not have his incarceration increased, by the improper plea. See Pa-14. Petitioner disagrees.

The concept of forcing trial courts to properly advise defendants before accepting a guilty plea demands more. Today, many people would actually face a period of incarceration rather than lose their drivers license for an extended period of time. The theory behind the right to have counsel participate in ones defense is a sacred one in our society. For any violation of N.J.S.A. 39:4-50 a defendant in New Jersey faces at least 22 separate and distinct penalties. Many of which are subject to enhancement upon recidivism.

The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be beyond the capability of layman.... [M]isdemeanor convictions may actually be less reliable than felony convictions. The volume of misdemeanor cases .... may create an obsession for speedy dispositions, regardless of the fairness of the result.... the misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush, ... Baldasar v Illinois, supra. at 228, footnote 2.

Petitioners assert that this Court's policy of forcing trial courts to properly advise defendants facing severe penalties, consequences of magnitude, is to protect society from the overreaching of the State. Many times people plead guilty to offenses that there are defenses for. An analogy may be drawn by the way in which this court treats violations of the Fourth Amendment, where the result of a violation becomes that the State may not make use of the fruit of the illegal search. In the present case the petitioner asserts that the State should not be allowed to make use of the fruit of the invalid plea.

Such fruit, includes all of the enhanced penalties. Not just incarceration. Petitioner asserts that the State will not deny that an increased license revocation is probably the single most important punitive affect in New Jersey, of a second versus a first offense. Thus, the Petitioner requests that this Court fashion a remedy to insure that trial courts across the nation scrupulously ensure that defendants knowingly, and intelligently offer guilty pleas. So that this Court may protect society from the "rush, rush..." of trial courts, where moving the calender is more important then the constitution.

2. WHETHER IT IS IMPROPER FOR A COURT TO PLACE THE BURDEN UPON THE DEFENDANT, WHO ASSERTS THAT HE WAS IMPROPERLY ADVISED ON A PRIOR OFFENSE, OF PROOF THAT THE DEFENDANT WAS ACTUALLY PREJUDICED BY THE UNCOUNSELED PLEA?

Yes. It is improper to force a defendant who was allowed to enter a guilty plea without the proper advisements of counsel to prove that he was innocent of the prior offense. The New Jersey Supreme Court indicates that the petitioner must be in a position to prove that he was actually prejudiced by the first trial court's deficient plea procedures. See State v Laurick, supra. at Pa-14.

Petitioner asserts that a proper reading of Baldasar indicates that it is defendant's burden to come forward and make the assertion and provide the proofs that he was not properly advised of his rights at the prior plea. Petitioner asserts the burden then shifts to the State to prove that the prior uncounseled plea did not prejudice the defendant. This Court did not specifically address the issue of what the burden on the defendant is. The petitioner asserts that the burden is by a preponderance of the evidence.

Petitioner relies upon several reasons to decipher the above burden. In United States v Tucker, 404 US 443, 30 L Ed 2d 592 (1972) this Court discussed this issue. When discussing whether there was enough evidence to convict Tucker of the prior offenses, notwithstanding the admitted constitutional violation, this Court stated,

> We need not speculate about whether the outcome of the respondant's 1938 and 1946 prosecutions would necessarily have been different if he had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. Id. at 447.

Moreover, in footnote 5 this Court stated,

> It is worth pointing out, however, that to make the contrary assumption, i.e., that the prosecutions would have turned out exactly the same even if the respondent had had the assistance of counsel, would be to reject the reasoning upon which the Gideon decision was based: '[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provide for him... That government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal court are necessities, not luxuries. Id.

Additionally, in Baldasar Mr. Justice Powell indicates it is the States burden to prove a prior conviction. Baldasar v Illinois, supra. at 227.

Additionally, the petitioner asserts that there is a presumption of an improper plea from a silent record and taken together with petitioners sworn testimony raises appropriate proof that the petitioners prior plea was invalid and should not be used against the petitioner.

The petitioner requests that this Court extend Burgett and Tucker to include misdemeanor's with serious consequences of magnitude, such as the petitioner faces in the present case. The burden place upon petitioner should not be that of proof that he was innocent of the prior conviction but rather proof that he was improperly advised by a trial court, who had the obligation to properly advise.

> ... we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. United States v Tucker, supra. at 447.

3. WHETHER IT IS IMPROPER FOR THE STATE TO APPEAL A SENTENCE THAT WAS NOT OBJECTED TO BY THE STATE WHEN THE PETITIONER WAS SENTENCED?

Yes. It violates due process for the defendant, petitioner to be subjected to an appeal of an issue which was not preserved by the State at the time the issue should have been raised.

Petitioner asserts that it is fundamental procedural due process to believe that; One, the State must play by the same rules as a defendant and; Two a defendant may not be subject to the harassment, costs and public disdain inherent with any appeal by the State.

In New Jersey no defendant may appeal an issue, other than jurisdiction, which was not preserved for an appeal at the trial level. In the present case the State simply did not object to the trial court sentencing the petitioner as a first offender. Thus, the State simply did not preserve the issue for appeal and is thus precluded from appealing to a higher court on this basis.

In the present case the State conceded that the trial court actually properly sentenced the petitioner. It is improper to then come along and say, by the way defendant, we changed our minds, we are now going to object. We are sorry that you must now pay your lawyer to represent you on appeal. We are sorry that you have to live with this hanging over your head for the next 3 years. We are sorry that your name is going to be in every

newspaper in the State. Sorry.

Petitioner asserts that "sorry" just does not quite cut it, constitutionally. There is no doubt in petitioner's mind that if petitioner had not preserved an issue for an appeal that the Courts' would have precluded the petitioner from raising the appeal. Therefore, the decision below should be reversed because the New Jersey Supreme Court was precluded from hearing the issue in the first place.

Respectfully Submitted,

Francis X. Moore

Michael R. Speck
On the brief.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DAVID J. LAURICK; PETITIONER,

VS

STATE OF NEW JERSEY; RESPONDENT.

PETITIONERS APPENDIX

TABLE OF APPENDICES

STATE V LAURICK, NJ (1990) PA-1

STATE V LAURICK, 231 NJ SUPER 464 (A.D. 1989) PA-16

STATE V LAURICK, NJ SUPER (L.D. 1987) PA-31

Transcript of Sentencing Hearing dated June 22, 1987 . . . . . PA-36

STATE OF NEW JERSEY
Plaintiff-Appellant

v.

DAVID J. LAURICK
Defendant-Respondent

Argued January 29, 1990 - Decided June 25, 1990

On certification to the Superior Court, Appellate Division, whose opinion is reported at 231 N.J. Super. 464 (1989).

Larry R. Etzweiler, Deputy Attorney General, argued the cause for appellant (Robert J. Del Tufo, Attorney General of New Jersey, attorney; Mr. Etzweiler and J. Grall Robinson, Deputy Attorney General, on the briefs).

Jay G. Trachtenberg argued the cause for respondent (Mr. Trachtenberg, attorney; Barbara A. Nyquist, on the briefs).

The opinion of the Court was delivered by O'Hern, J. The question in this case is whether the assertion that a prior guilty plea to a charge of driving while intoxicated (DWI) was without the advice of counsel prevents the imposition of enhanced penalties on a second DWI conviction.

There are two aspects of our analysis. The first is constitutional analysis of the limits on a state's power to impose recidivist penalties on the basis of uncounseled convictions. The second is a more familiar judicial analysis of what constitutes good cause for collateral relief from an earlier judgment of conviction.

We hold that with the exception that a prior DWI conviction that was uncounseled in violation of court policy may not be used to increase a defendant's loss of

liberty, there is no constitutional impediment to the use of the prior uncounseled DWI conviction to establish repeat offender status under DWI laws. With respect to collateral consequences of an uncounseled conviction other than a loss of liberty, any relief to be afforded should follow our usual principles for affording post-conviction relief from criminal judgments, namely, a showing of a denial of fundamental justice or other miscarriage of justice.

I

The significance of the ruling lies in the progressively enhanced penalties that second and third offenders receive under our drunk driving laws. N.J.S.A. 39:4-50. Without intending this to be a definitive digest of such provisions, which are often amended, we note the following: Penalties for first offenders include a fine between $250.00 and $400.00, detainment between twelve and forty-eight hours at an Intoxicated Driver Resource Center, license suspension for a period between six months and one year, and up to thirty days' imprisonment. N.J.S.A. 39:4-50(a)(1). Second offenders must do thirty days of community service, and are subject to a fine between $500.00 and $1,000.00, a mandatory two-year license revocation, and from forty-eight hours to ninety days' imprisonment. N.J.S.A. 39:4-50(a)(2). Penalties for third offenders include a mandatory $1,000.00 fine, a mandatory ten year license revocation, and a mandatory 180 day prison term, which may be commuted to ninety days with ninety days' community service. N.J.S.A. 39:4-50(a)(3). A court imposing a term of imprisonment may sentence an offender to an in-patient rehabilitation program or other facility approved by the Director of the Division of Alcoholism in the Department of Health. In the alternative, a court may sentence a first or second of-

fender to an Intoxicated Driver Resource Center. Ibid. All DWI offenders must satisfy the screening, evaluation, referral, program and fee requirements of the Division of Alcoholism's Intoxicated Driving Programs Unit and of the Intoxicated Driver Resource Centers, and must complete a program of alcohol education and highway safety. N.J.S.A. 39:4-50(b). In addition, pursuant to the New Jersey Automobile Insurance Reform Act of 1982, L. 1983, c. 65, every offender is subject to an insurance surcharge of $1,000.00 a year for three years, but a third offense within three years results in an increase to $1,500.00 a year. N.J.S.A. 17:29A-35(b)(2). Every offender must pay a $100.00 Drunk Driving Enforcement Fund surcharge. N.J.S.A. 39:4-50.8.

In this case defendant was arrested for DWI on September 4, 1985. After unsuccessfully challenging breath-test results, he pled guilty in Municipal Court on June 22, 1987. During the 1987 plea proceedings he admitted that he had pled guilty to the same charge in 1982. He stated, however, that at the earlier proceeding he had been unrepresented by counsel, unaware of his right to counsel, and uninformed of that right by the previous judge. The Law Division judge, who was sitting as Municipal Court Judge, sentenced defendant as a first offender, and ruled in a reported opinion that defendant's prior uncounseled conviction could not be used to enhance punishment absent an intelligent waiver of right to counsel. 222 N.J. Super. 636 (1987). He relied on Rodriquez v. Rosenblatt, 58 N.J. 281 (1971), which established a right to counsel whenever defendant is exposed to a "consequence of magnitude". The Appellate Division affirmed, agreeing with the lower court that in the face of defendant's statement, there could be no presumption that the 1982 municipal court informed defendant of his right to counsel, as it was required to do by Rule 3:27-2. 231 N.J. Super. 464 (1989); see also State v. Carey, 230

N.J. Super. 402 (App. Div. 1989) (no presumption that municipal court regularly followed administrative directive to inform defendants of right to counsel).

There were no proofs presented at the 1987 sentencing proceeding to rebut defendant's statement that the 1982 court had failed to advise him of the right to appointed or retained counsel. Stenographic or sound recordings of municipal court proceedings are required to be kept for only three years. R. 7:4-5(a). The municipal court judge who presided at the 1982 plea proceeding did not testify. For purposes of this appeal, however, we accept the posture of the case as we have received it, namely, that there was an absence of the Rodriquez advisory at the start of the 1982 municipal court proceedings. We granted certification, 117 N.J. 52 (1989), and now reverse.

II

It is now well settled that there is a sixth-amendment right to counsel in felony cases. Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799 (1963). In misdemeanor cases there is a right to counsel only if the conviction results in imprisonment. Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed. 2d 530 (1972).

As Justice Jacobs pointed out in Rodriquez v. Rosenblatt, supra, 58 N.J. at 285, New Jersey has "never utilized the traditional English felony-misdemeanor classification." We have viewed the difference as between indictable offenses and non-indictable offenses, familiarly known as disorderly persons. We have a long history of legislative concern that where an indictment has been returned against a defendant who is indigent, the accused shall be entitled to assigned counsel without cost. Ibid. (citing Act of March 6, 1795, Paterson, Laws 162 (1800); See State v. Rush, 46 N.J. 399 (1966). At the time of the

Rodriquez decision every person charged with an indictable offense was entitled to retain counsel and to have the office of the Public Defender represent him or her if indigent. Our Rules of Court required that such persons be advised of such rights. R. 3:27-1.

In Rodriquez the Court recognized that the federal constitutional guarantee of jury trial is inapplicable to petty offenses, which have generally been considered to be those punishable by no more than six months in prison, and noted that it "join[ed] the many state courts which have announced that, pending further controlling decision by the Supreme Court, there will be no inflexible constitutional compulsion to assign counsel without cost to indigents charged in the municipal courts with disorderly person or other petty offenses." 58 N.J. at 294.

Nevertheless, considerations of fairness dictated that "as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Id. at 295. Thus, the Court ruled not as a matter of constitutional compulsion, but in the exercise of its supervisory jurisdiction over procedures in New Jersey courts. The Court explained: We have on many occasions announced policy rulings which, though not constitutionally or legislatively compelled, have served to protect the proper interests of the defendant and to advance the sound administration of justice in our courts." Id. at 294.

In furtherance of the sound administration of justice, our Court has adopted directives detailing procedures for assigning counsel to indigents charged with petty offenses. See Implementing Instructions of the Administrative Director of the Courts, in "Supreme Court Establishes Right to Assigned Counsel in Petty Offenses", 94 N.J.L.J. 421 (1971). A Court Rule already in place when Rodriquez

was decided instructs municipal court judges to inform every person charged with a non-indictable offense "of his right to retain counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of his right to have counsel assigned without cost". R. 3:27-2. The New Jersey Bench Book for Municipal Courts (rev. Jan. 1987) directs that each defendant be informed of those rights individually. Id. at C-13-15. In a memorandum to municipal court judges we emphasized the importance of individual advisement when defendants are indigent and face a potential "consequence or magnitude". Memorandum from Chief Justice Wilentz re Rule 3:4-2 (Feb. 25, 1986).

III

What follows, then, from the the fact that the Rodriquez advisory was not followed? Recall that in this case the core values of Rodriquez are not implicated. Defendant did not claim at the 1987 plea proceedings that he was denied equal protection of the law by reason of indigency at the time of the 1982 proceedings.

To test the proposition, it may be helpful to assume that following his 1982 conviction, defendant, reflecting on the outcome of his case, had consulted an attorney and had asked the attorney to set aside the guilty plea on the basis that he had not been given the notice. And assume as well that he was not indigent at the time.

Although there is no rule specifically allowing for an application for post-conviction relief in the municipal courts, it seems generally to be agreed that our Rules of Court may fairly be said to encompass such a proceeding. In an ably written Law Division opinion, In re Petition of Santiago, 104 N.J. Super. 110 (1968), aff'd o.b., 107 N.J. Super. 243 (App. Div 1969), Judge Artaserse traced the history of the post-conviction relief proceedings in New

Jersey and concluded that a "literal reading [that would limit the rules only to criminal offenses would] overlook[] the history and intent of the post-conviction procedure". Id. at 114. Granted, the petitioner in Santiago had suffered a loss of liberty, the analysis remains appropriate and appears to have been generally followed in our courts. See, e.g., State v. Paladino, 203 N.J. Super. 537 (App. Div. 1985); State v. Zold, 105 N.J. Super. 194 (Law Div. 1969), aff'd o.b., 110 N.J. Super. 33, certif. denied, 57 N.J. 131 (1970).

In post-conviction relief proceedings we ordinarily say that a defendant may not raise on collateral attack issues that might reasonably have been raised in a direct appeal. See R. 3:22. In addition, we say that a plea of guilt waives all procedural objections that a defendant may have. Of course, such a plea may be later challenged on the ground that there was no factual basis for it. State v. Barboza, 115 N.J. 415 (1989), or that the defendant was unaware of its penal consequences, State v. Kovack, 91 N.J. 476 (1982).

But there are exceptions to those general rules. Under Rule 3:22-4 a ground not raised on direct appeal can be raised on collateral review if denial of the petition would be contrary to the Constitutions of the United States or the State of New Jersey, or would result in fundamental injustice.

As noted, Rodriquez makes it clear that the denial of counsel would not constitute a violation of constitutional right under either state or federal constitutions, so obviously an absence of the notice could not be of constitutional dimension. As to what would constitute fundamental injustice, it may be useful to consider a case such as State v. Cerbo, 78 N.J. 595 (1979).

In that case the court dealt with a violation of statutory policy rather than, as here, administrative policy, but the principles are the same. The State's wiretap law required

that authorized wiretaps be promptly sealed. On post-conviction relief, the defendant raised an issue with respect to that statutory violation. The Court ruled that absent constitutional infringement or the timely raising of an issue available on direct appeal, "relief will be granted in such proceedings only in exceptional circumstances involving a showing of fundamental injustice". Id. at 605. Thus, the Court concluded that:

> [p]ost-conviction relief should not be furnished if its sole purpose would be to vindicate a statutory policy, where the statutory policy, where the statutory violation has not in any way reflected prosecutorial bad faith or insolence in office nor had the slightest impact upon guilt or innocence or wrought a miscarriage of justice for the individual defendant. [Id. at 607]

We may translate this ruling to say that if the administrative violation of the Rodriquez directive has not wrought a miscarriage of justice for the individual defendant, the absence of notice would not be a ground for relief.

We agree in general with the approach set forth in State v. Carey, supra, 230 N.J. Super. 402, to the effect that compliance with the Rodriquez directive cannot be conclusively presumed just because we have a rule that says such notice will be given. A defendant in a second or subsequent DWI proceeding should have the right to establish that such notice was not given in his or her earlier case, and that if defendant is indigent, the DWI conviction was a product of an absence of notice of the right to assignment of counsel and non-assignment of such counsel without waiver. A non-indigent defendant should have the right to establish such lack of notice as well as the absence of knowledge of the right to be represented by counsel of one's choosing and to prove

that the absence of such counsel had an impact on the guilt or innocence of the accused or otherwise "wrought a miscarriage of justice for the individual defendant". State v. Cerbo, supra, 78 N.J. at 607.

In evaluating, in the case of non-indigents, whether a miscarriage of justice has occurred, "innocence or guilt is indeed relevant among the several considerations which should properly mold the discretion of a judge" in determining whether to relieve a party of a plea. State v. Johnson, 131 N.J. Super. 252, 256 (App. Div. 1974); see also State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (applying the same principles in the case of a finding of guilt). On the issue of a demonstration of miscarriage of justice, as on others, the defendant has the burden of proving the right to post-conviction relief. State v. Zold, supra, 105 N.J. Super. at 203; see also R . 3:22 (providing for petition for post-conviction relief). Hence, we disapprove State v. Breyan,_____ N.J. Super. _____(Law Div. 1990), which, without such showing, applied the opinion below retroactively to allow collateral attack on a prior uncounseled DWI conviction.

The proceeding to challenge the collateral effect of such prior convictions should properly be in the municipal court in which the original conviction was entered. We realize the difficulty in reviewing such dispositions more than three years after the fact when transcripts or tapes of the proceedings are no longer available. Still, it will be much easier in the original court to arrange for a thorough and complete review of the dockets of the proceedings. Sometimes notation of an attorney's entry of an appearance may be in the case file. In addition, any available police records may confirm or dispel the absence of counsel in the proceedings, and in the case of non-indigence, the evidence bearing on guilt or innocence. That requirement of proceeding in the court of original jurisdiction should be equally applicable when the only

issue is whether the uncounseled plea precluded imposition of an additional loss of liberty. Resolution of that issue will ordinarily be simpler and more straightforward, with the only consequence that the period of incarceration imposed may not exceed that available for the counseled conviction.

In the future, the hard-copy judgment of conviction in DWI cases should contain a notation by the municipal court that the Rodriquez notice has been given and counsel waived. That notation will have presumptive correctness. See Evid. R. 9 (2)(b) (allowing judicial notice of court records). Our Rule of Court, Rule 7:4-6(b), prescribing the contents of a judgment of conviction, should be modified accordingly. In addition, in the future the automated traffic system (ATS) records to be developed on computer base will permit storage of daily docket information for longer periods of time without space or storage problems. These records can be readily retrieved and will almost invariably contain calendar notations.

In this case we have a showing only of a violation of administrative or judicial policy without any showing of prejudicial effect on defendant because it has not been shown that defendant was in any way prejudiced by reason of indigency in such proceedings. Nor, except as we conclude with respect to the extent of later imprisonment, was there violation of constitutional requirement. The strict waiver requirements of Faretta v. California, 422 U.S. 806, 45 L.Ed. 2d 562 (1975), are implicated only when the right to counsel is of constitutional dimension. We would not go so far as to say that a defendant would have to show that the presence of counsel would have necessarily won the case for him. The importance of counsel in an accusatorial system such as ours is well recognized, see Rodriquez, supra, 58 N.J. at 285, but to establish injustice there should at least be some showing that the absence of the notice resulted in the unavailability

of counsel for one otherwise unable to afford counsel, or in the case of a non-indigent, that the absence of notice had a "real probability" of having played a role in the determination of guilt. State v. Reynolds, 43 N.J. 597, 602 (1965) (technical error not ground for reversal absent such a showing of prejudice). To conclude otherwise would exalt form over substance. "All else being equal, we see no reason why one who is admittedly guilty of the crime with which he is charged, and who, on the motion, cannot suggest any defense that will be of avail to him, should be permitted -- to borrow a phase from State v. Herman [47 N.J. 73, 79 (1966)] -- 'to play fast and loose with our courts'". State v. Johnson, supra, 131 N.J. Super. at 256.

IV

If the conviction, then, be not subject to collateral attack through post-conviction relief on this record, the question remains whether it is invalid for the purpose of enhancing the penalties imposed under the New Jersey Motor Vehicle Act. In State v. H. G. G., 202 N.J. Super. 267 (App. Div. 1985), Judge Matthews traced the development of United States Supreme Court doctrine with respect to the use of uncounseled convictions to establish enhanced penalties. He noted that following Gideon v. Wainwright, supra, 372 U.S. 335, 9 L.Ed. 2d 799, "the Court consistently held that because an uncounseled felony conviction was constitutionally invalid -- and therefore void -- it could not be put to other uses in court." Id. at 274; see Burgett v. Texas, 389 U.S. 109, 19 L.Ed. 2d 319 (1967) (uncounseled felony conviction invalid to enhance punishment under recidivist statute). In contrast, although Argersinger v. Hamlin, supra, 407 U.S. 25, 32 L.Ed. 530 (1972), prohibits imprisonment for any uncounseled offense, absent waiver, it does not prohibit use of such

uncounseled conviction to deny expungement of another conviction. 202 N.J. Super. at 274.

Most recently, in Baldasar v. Illinois, 446 U.S. 222, 64 L.Ed .2d 169 (1980), the Court held that an uncounseled misdemeanor conviction (in which a defendant would not have been entitled to counsel because there was no actual imprisonment) could not be used to elevate a subsequent conviction from a misdemeanor to a felony and permit the defendant to be sentenced to three years in prison rather than the one-year maximum. Uncounseled prior convictions cannot be used to enhance punishment by "convert[ing] a subsequent misdemeanor into a felony with a prison term". Id. at 222, 64 L.Ed. 2d at 172.

Regrettably, the Baldasar ruling is far from clear in either its holding or its continuing vitality. There was no Court opinion in Baldasar. Four members of the Court shared the understanding above stated. Justice Blackman, however, concurred in the result because, in his view, Baldasar, having been originally charged with a felony (carrying an exposure to a sentence in excess of six months), could not have been tried without benefit of counsel. Hence, his conviction was void for all purposes. As noted, the majority adhered to the Argersinger rule that an uncounseled conviction is void only when the actual sentence imposed is one of imprisonment. But, as the dissenting members of the Court pointed out, Scott v. Illinois, 440 U.S. 367, 59 L.Ed .2d 383 (1979), explicitly held that "an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed". Baldasar, 446 U.S. at 230, 64 L.Ed .2d at 176-77 (Powell, J., dissenting). Considering such a conviction constitutionally invalid to enhance punishment for a subsequent misdemeanor conviction creates a hybrid class of convictions, thus illogically burdening trial courts with the task of attempting to predict which misdemeanants are likely to become recidivists. Id. at 231-32, 64 L.Ed.2d at 177-78.

Since the 1980 Baldasar ruling did not command a Court opinion, there must be doubt not only of its vitality but of whether the Supreme Court would ever extend its holding.

Not surprisingly then, state courts have been all over the lot on the meaning and effect of Baldasar . For example, Pennsylvania holds to the narrowest view of Baldasar, advanced by Justice Blackman, that uncounseled prior convictions may be used to enhance custodial penalties unless the earlier offense was punishable by more than six months' imprisonment. Commonwealth v. Thomas, 510 Pa. 106, 507 A .2d 57 (1986). North Dakota holds to that view as well, but employs its state constitution to expand the prohibition of enhanced prison terms based on any uncounseled prior convictions absent waiver. State v. Orr, 375 N.W. 2d 171 (N.D. 1985). Other courts have read Baldasar broadly. Maine interprets its teaching, as well as the Maine constitution, to preclude use of any uncounseled conviction to enhance penal sanctions, custodial or non-custodial, in a later proceeding. State v. Dowd, 478 A . 2d 671 (Me. 1984). Kansas has adopted the view advanced by Justice Marshall, that a conviction invalid to impose a custodial sentence is invalid to enhance custodial punishment in a later conviction. State v. Oehm, 9 Kan. App. 2d 399, 680 P .2d 309 (1984).

The United States Supreme Court has denied certiorari in a Georgia case in which a defendant received an enhanced penalty based on a prior uncounseled DWI conviction. Moore v. Georgia, 484 U.S. 904, 98 L.Ed. 2d 204 (1987). On Moore 's later habeas corpus petition the Eleventh Circuit held that Baldasar does not forbid enhancing incarceration penalties based on any prior uncounseled conviction, but only based on prior convictions where defendant was uncounseled due to the unavailability of counsel attributable to either indigence or

state misconduct. Moore v. Jarvis, 885 F . 2d 1565, 1572-73 (1989).

Although we have genuine doubt, then, about the conclusive effect of Baldasar, we prefer not to try to divine the further course of the Court in this area. We are satisfied that there is a core value to Baldasar that we should follow: that an uncounseled conviction without waiver of the right to counsel is invalid for the purpose of increasing a defendant's loss of liberty. In the context of repeat DWI offenses, this means that the enhanced administrative penalties and fines may constitutionally be imposed but that in the case of repeat DWI convictions based on uncounseled prior convictions, the actual period of incarceration imposed may not exceed that for any counseled DWI convictions. For example, a third offender with one prior uncounseled conviction could not be sentenced to more than ninety days' imprisonment.

V

To sum up:

(1) It is constitutionally permissible that a prior uncounseled DWI conviction may establish repeat-offender status for purposes of the enhanced penalty provisions of the DWI laws of the State of New Jersey. The only constitutional limit is that a defendant may not suffer an increased period of incarceration as a result of a Rodriquez violation that led to an uncounseled DWI conviction.

(2) No other relief necessarily flows from a Rodriquez violation that led to a prior uncounseled DWI conviction. The judicial policies expressed in Rodriquez v. Rosenblatt, of giving notice to accused of a right to be represented by counsel, do not create a constitutional entitlement to such notice. Nor does the absence of such notice demonstrate a fundamental injustice unless there be some showing in post-conviction relief proceedings that it preju-

diced the defendant in that the defendant (a) was unaware of such rights, and (b) if indigent, would have derived benefit from the notice by seeking the assistance of counsel. A non-indigent defendant would have to show in addition that the lack of notice otherwise affected the outcome. No such showing was made in this case.

(3) Post-conviction relief from the effect of prior convictions should normally be sought in the court of original jurisdiction, which will be in the best position to evaluate whether there has been any denial of fundamental justice. Appeals from the disposition in that court shall be combined with any appeal from proceedings involving the repeat offense.

The judgment of the Appellate Division is reversed and the matter remanded to the Law Division for further proceedings in accordance with this opinion. On this record, the only relief warranted is that defendant's imprisonment for this second violation not exceed thirty days. Nor may the forty-eight hours of custody required of second offenders by N.J.S.A. 39:4-50(a)(2) be regarded as mandatory. As to any other relief, defendant shall have the right, within thirty days of the remand, to apply to the court of original jurisdiction for post-conviction relief from the judgment entered there in accordance with the principles set forth in this opinion.

STATE OF NEW JERSEY
Plaintiff-Respondent
and Cross-Appellant

v.

DAVID J. LAURICK
Defendant-Appellant
and Cross-Respondent

Argued December 6, 1988 - Decided February 28,

1989 - Before Judges Antell, Dreier and Havey

The opinion of the Court was delivered by HAVEY, J.A.D.

After defendant's motion to suppress the results of his breathalyzer tests was denied, he entered a conditional guilty plea in the Superior Court, Law Division, to driving while under the influence of alcohol, contrary to N.J.S.A. 39:4-50. In a reported opinion at 222 N.J. Super. 636 (Law Div. 1987), Judge Haines found that defendant was a first offender and sentenced him to a six month revocation of his driving privileges together with a fine of $250.00.

On appeal, defendant claims that his breathalyzer test results should have been suppressed because the breathalyzer utilized by the State Police, a National Draeger, Model 900, has not been certified pursuant to N.J.A.C. 13:51-3.2 as an approved method of breath testing. He also argues that the applicable regulations for testing and certifying methods and instruments for breath testing are void for vagueness. Finally, he contends that the trial court abused its discretion in denying his discovery demand that the State produce "relevant and material"

evidence pertaining to the Breathalyzer, Model 900. On its cross-appeal, the State asserts that the trial court erred in not sentencing defendant as a second offender. We now affirm.

Defendant was arrested in 1985 in North Hanover Township for driving while under the influence. He was transported to the Fort Dix Police Barracks where the State Police administered two breath tests utilizing the Draeger Breathalyzer, Model 900. Defendant stipulated that the results of these tests revealed a blood-alcohol level in excess of 0.10%. See N.J.S.A. 39:4-50(a).

[1-3] Defendant moved to suppress the breath test results, contending that the State failed to have the Draeger machine tested and certified as required by N.J.A.C. 13:51-3.2. At the hearing, it was determined that Draeger had purchased the patent and manufacturing rights to the "breathalyzer" from Smith & Wesson Corporation, which had acquired the rights from Stephenson Corporation. Defendant initially stipulated that the Draeger machine was identical to the machine manufactured by Smith & Wesson. Because N.J.A.C. 13:51-3.5 and N.J.A.C. 13:15-3.6 approve the "Breathalyzer, Model 900" as an instrument and method for chemical breath testing, the trial court concluded, based in part on defendant's stipulation, that independent testing and certification of the Draeger Model 900, were not required "merely because of a change of manufacturer." The trial court, therefore, denied the motion to suppress.

Defendant moved for reconsideration, arguing that he had "new evidence" that there were differences between the Draeger and Smith & Wesson machines. He also moved for discovery, demanding that the State produce all records of its testing and certification of the Smith & Wesson and Stephenson Model 900's, and of all records of repairs, malfunctions, and "retirements of Model 900 machines. The trial court denied this request, but ordered

the State to produce any schematic drawings of the Draeger machine and further ordered that the breathalyzer utilized to test defendant be made available for inspection by defendant's expert.

On the trial date, defendant repeated his principal contention that the State's failure to retest and recertify the Draeger Model 900 compelled suppression of the breath test results. However, defendant was unable to produce any evidence, expert or otherwise, demonstrating a difference between the Draeger and Smith & Wesson machines. Concluding that defendant failed to rebut the presumptive validity afforded the Attorney General's actions, the trial court again denied the motion to suppress.

Defendant thereupon entered a conditional plea of guilty to a violation of N.J.S.A. 39:4-50(a). Prior to sentencing, he testified that in 1982 he had entered a guilty plea without counsel to a driving while under the influence charge. He stated that the Municipal Court did not then advise him of his right to retain counsel and thus he was unaware of that right when he entered the plea. Concluding that defendant had met his burden of proving the absence of counsel at the time of his first conviction, Judge Haines, sitting as a municipal court judge, found that the first conviction could not be considered for sentence enhancement purposes under N.J.S.A. 39:4-50(a)(2). See State v. Laurick, supra, 222 N.J. Super. at 640.

Defendant again argues before us that while the Smith & Wesson Breathalyzer, Model 900, may be an approved instrument and method of breath testing, the Model 900 manufactured by Draeger has never been independently tested and approved by the State Police and Attorney General, and thus cannot be considered "valid" as a breath testing technique.

N.J.S.A. 39:4-50.3 provides that chemical analysis of a

person's breath, "to be considered valid under the provisions of this act," must be performed "according to methods approved by the Attorney General, and by a person certified for this purpose by the Attorney General." Rules promulgated by the Attorney General regulating chemical breath testing are codified at N.J.A.C. 13:51-1.1, et seq. Specifically, N.J.A.C. 13:51-3.5(a), as amended in 1982, states, in relevant part, that:

> The Breathalyzer, Model 900, is an instrument approved by the Attorney General ... and this subchapter, for the testing of a person's breath by chemical analysis. [Emphasis supplied].

The Breathalyzer, Model 900, is also an approved method for performing chemical analysis of a person's breath. See N.J.A.C. 13:51-3.6(a).

Approval of instruments utilized for breath testing is governed by N.J.A.C. 13:51-3.2, which designates the Superintendent of State Police as the official to test the instrument and method for "specificity, precision and accuracy." Upon completion of testing, the Superintendent recommends approval to the Attorney General, who, on review, may certify the instrument or method pursuant to law. N.J.A.C. 13:51-3.2(d).

Defendant notes that Draeger's acquisition of Smith & Wesson's patent right to the Model 900 simply protects Draeger from competitors producing the same machine, but does not prohibit Draeger from altering or modifying the instrument and making the Model 900 less reliable. He therefore argues that separate testing and certification of the instrument produced by each manufacturer is required under N.J.A.C. 13:51-3.2 to assure the requisite "specificity, precision and accuracy." To require less, defendant contends, violates N.J.S.A. 39:4-50.3 and his due process rights under the Fourteenth Amendment.

Defendant's argument ignores the fact that the regulations certify the "Breathalyzer, Model 900" as an approved instrument and method for breath testing without reference to specific manufacturers of the instrument. The apparent legislative intent of the regulations was to approve a generic instrument and method for the testing of a person's breath as developed and perfected by Robert F. Borkenstein, as originally approved by the Attorney General in 1966. See State v. Yerkes, 189, N.J. Super. 147, 150 (Law Div. 1983). The Breathalyzer, Model 900, was the first Borkenstein machine used in New Jersey and approved by the Attorney General. Id. at 151. The clear and unambiguous language of the present regulations, approved in 1982, adopts this instrument and method without reference to a name of the specific manufacturer.

The legislative history of N.J.A.C. 13:51-3.5 and N.J.A.C. 13:51-3.6 supports this conclusion. In September 1966, the Attorney General approved as a method of chemical analysis of breath for determining blood-alcohol content "[t]he breathalyzer as developed and perfected by Robert F. Borkenstein." See State v. Yerkes, supra, 189 N.J. Super. at 150. In 1969, N.J.A.C. 13:51-21, now repealed, listed "approved methods and instruments" as including "[t]he breathalyzer as invented by Professor Robert Borkenstein....." As published in February 1980, N.J.A.C. 13:51-3.5 included the following "approved methods and instruments":

(a) The Breathalyzer as invented by Professor Robert Borkenstein[.]

.....

(b) The Dominator Albreath manufactured by the Stephenson Company[.]

(c)The Alco-Tector as manufactured by Decatur Electronics [.]

(d) The Breathalyzer, Model 100, manufactured by Smith & Wesson/General Ordinance Equipment Company.

In 1982, N.J.A.C. 13:51-3.5 was amended as follows:

Approved instruments for performing chemical analysis of a person's breath

(a) The Breathalyzer, Model 900[.]
(b) The Breathalyzer, Model 900A[.]
(c) The Dominator Albreath[.]
(d) The Alco-Tector[.]
(e) The Breathalyzer, Model 1000[.]

Summarizing reasons for the proposed 1982 amendment, the Attorney General stated:

The proposed rule deletes the existing text of N.J.A.C. 13:51 and replaces it with new language to accomplish necessary revision, up-dating and clarification of the terms and conditions applicable to... forms and methods by which the Attorney General certifies chemical breath test equipment and the methods for the use of these devices.

The new language will also assist the various courts in this State by providing definitions and clearer application of these rules and regulations thus avoiding potential misinterpretation. The principal changes in the proposed language include: ... clarification of the approved devices and methods for their use. [14 N.J.R. 376 (1982)].

We view the 1982 amendments deleting reference to manufacturers as reflecting a clear intent on the Attorney General's part to approve the generic breathalyzer, Model 900, originally invented by Borkenstein. Implicit in the amendments is the analysis and components of the

instrument are reliable and manufacturing rights. The Law Division in Yerkes, in a different context, so held. The court concluded that although the Model 900A was not expressly approved by the regulations when defendant was arrested and tested, it was essentially the same method of chemical breath testing approved by the Attorney General when he certified "The Breathalyzer as invented by Professor Robert Borkenstein[.]" See 189 N.J. Super. at 151-152.[1]

Further, a long period of consistent construction by an agency of its own regulations is entitled to great weight in ascertaining the meaning or intent of the language used. See N.J. Bldrs. v. Dept. of Environmental Protec., 169 N.J. Super. 76, 89-90 (App. Div.), certif. den. 81 N.J. 402 (1979); In re Plainfield-Union Water Co., 57 N.J. Super. 158, 177 (App. Div. 1959). The State Police have utilized the Draeger instrument since Draeger acquired the patent and manufacturing rights from Smith & Wesson. Pursuant to N.J.A.C. 13:51-3.4, the Draeger Model 900 is inspected periodically by a Breath Test Coordinator to assure its specificity, precision and accuracy. The inspection certificate filed after inspection certifies that the instrument inspected was a "Breathalyzer 900", as approved by the regulations. The fact that the

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1. In Romano v. Kimmelman, 96 N.J. 66, 72 (1984), the Supreme Court conclusively determined by order that the breathalyzer, Models 900 and 900A, are scientifically reliable. See also State v. Downie, 229 N.J. Super, 207 (App. Div. 1988), leave to appeal granted 114 N.J. 498 (1989). Although the order refers only to the Smith & Wesson model, it also states that "[t]he results of the administration of the Model 900 can be received in evidence in accordance with the standards under State v. Johnson, 42 N.J. 146 (1964)[.]" Rom ano, sup ra. 96 N.J. at 72 [emphasis supplied]. We read the order and opinion as referring to the generic Model 900, and not intending to limit its application to a specific manufacturer.

Attorney General has not considered a change in the manufacturer of the Model 900 as a sufficient basis to retest and recertify the machine is persuasive evidence that the State Police and Attorney General have examined the instruments and have found no difference in the Model 900 as manufactured by Draeger since it acquired the rights from Smith & Wesson.

Moreover, requiring retesting and recertification upon change in manufacturers leads to an absurd result. see State v. Gill, 47 N.J. 441, 444 (1966). If defendant is correct, retesting and recertification may indeed be required when the manufacturer of the machine merges with another company, or if it changes its trade name or, as the trial court noted, if there are changes in the personnel who manufacture the instrument.

Finally, a presumption of reasonableness must be afforded the Attorney General's interpretation of the regulations. See Barone v. D. of Human Serv., Div. of Med. Asst., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd 107 N.J. 355 (1987). Where the Legislature, as here, entrusts an agency with the responsibility of "selecting the means of achieving an articulated statutory policy, the relation or nexus between the remedy and the goal sought to be accomplished is peculiarly a matter for administrative competence." NJPDES Permit No. NJ 0055247, 216 N.J. Super. 1,11 (App. Div.), Certif. den. 108 N.J. 185 (1987). The burden is on the party who challenges the validity of the action as being arbitrary, or as being contrary to the legislative purpose. Smith v. Ricci, 89 N.J. 514, 525 app. dis. 459 U.S. 962, 103 S.Ct. 286, 74 L.Ed. 2d 272 (1982).

Here, the trial court gave defendant ample opportunity to demonstrate how the Draeger Breathalyzer, Model 900, was different than the instrument manufactured by Smith & Wesson. Defendant had the schematic of the

Model 900 and his expert had the opportunity to inspect the Draeger instrument utilized for defendant's testing.[2] Neither defendant nor his expert was able to present any evidence that Draeger had altered or modified the Breathalyzer, Model 900, since the time it had acquired the patent and manufacturing rights from Smith & Wesson. We agree with the trial court that, without more, no reasonable inference can be reached that the Draeger instrument was any different than that manufactured by Smith & Wesson.

[4] We also reject defendant's contention that the trial court erred in denying his demand for discovery. Defendant requested records of repairs, malfunctions and "retirement" of all Breathalyzer Model 900 instruments, presumably since 1966, as well as records of the testing and certification of the Smith & Wesson and Stephenson Model 900's. While our system recognizes a defendant's right to have complete discovery, "allowing a defendant to forage for evidence without a reasonable basis is not an ingredient of either due process or fundamental fairness in the administration of the criminal laws." State v. R.W., 104 N.J. 14, 28 (1986). Beyond being unreasonably burdensome and far-reaching, these records were not relevant to the issue before the trial court. See R.3:13-3(a). The records at best were relevant as to the issue of reliability of the Model 900, not whether there were differ-

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2. Pursuant to the trial court's discovery order, the Attorney General submitted two pamphlets to defendant, one bearing a 1968 Stephenson Corporation copyright and the other being a "Breathalyzer Model 900 Instruction Manual, National Draeger, Inc.," 1979 edition. The Draeger manual was in fact a Smith & Wesson manual with a National draeger corporate label affixed. Within the manual were a number of schematic drawings of the Breathalyzer, Model 900.As far as we can determine from the record, no other Draeger schematic is in the possession of the Attorney General.

ences in the machine as manufactured by Draeger and Smith & Wesson.[3] The trial court pressed defendant to show how these records would be relevant to establish differences, and defendant failed to do so. The trial court ordered the relevant schematics be produced and also directed that defendant's expert be permitted to examine the machine in question. We find no abuse of discretion in the trial court's denial in the remainder of defendant's demand.

[5] Finally, we find no merit to defendant's contention that the regulations are void for vagueness. "A law is void as a matter of due process if it is so vague that persons' of common intelligence must necessarily guess at its meaning and differ as to its application'." Town Tobacconist v. Kimmelman, 94 N.J. 85,118 (1983), quoting Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926). N.J.A.C. 13:51-3.5 is designed to give law enforcement officers notice of what breath-testing devices have already been approved by the Attorney General. Defendant's vagueness argument was therefore properly rejected by the trial court.

[6,7] On the State's cross appeal, it contends that the trial court erred in sentencing defendant as a first offender.[4] It argues that since defendant did not receive a custodial sentence in 1982, his Sixth Amendment right to counsel was not violated as a result of the municipal court's failure to advise him of his right to counsel. See Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L.Ed. 2d

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3. The records may not have been relevant as to the issue of reliability in view of the Supreme Court's holding and order in Romano, 96 N.J. at 72.

4. The State has the right to cross appeal to seek correction of an illegal sentence. See State v. Sheppard, 125 N.J. Super. 332, 336 (App. Div.), certif. den. 64 N.J. 318 (1973). If defendant was a second offender, the sentence imposed was illegal. See N.J.S.A. 39:4-5-(a)(2).

383 (1979); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed 2d 530 (1972). It also argues that Rodriquez v. Rosenblatt, et al, 58 N.J. 281, 295 (1971), which requires a municipal court to assign counsel to indigent defendants in cases involving a "consequence of magnitude," does not preclude use of a prior uncounseled conviction where, as here, there is no evidence that defendant was indigent at the time of his 1982 conviction. The State therefore contends that defendant's 1982 uncounseled conviction may be used for enhancement purposes even if he had not been advised of his right to counsel. We disagree.

In a plurality opinion in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed. 2d 169, reh. den. 447 U.S. 930, 100 S.Ct. 3030, 65 L.Ed. 2d 1125 (1980), five justices, in three concurring opinions, concluded that the Sixth Amendment prohibited the use of a prior uncounseled conviction to enhance defendant's subsequent conviction from a misdemeanor to a felony. Justice Stewart reasoned that since defendant was sentenced to an increased term of imprisonment " only because" he had been previously convicted without the assistance of counsel, the enhanced sentence violated the rule of Scott v. Illinois, supra, 440 U.S. at 373-374, 99 S.Ct. at 1162, 59 L.Ed. 2d at 373-74, which adopted actual imprisonment as the line defining the constitutional right to appointment of counsel. Baldasar v. Illinois, supra, 446 U.S. at 224, 100 S.Ct. at 1586, 64 L.Ed. 2d at 172-173. In his concurring opinion, Justice Marshall reasoned that while the first uncounseled conviction may not have violated Scott, it could not be used for enhancement purposes where the enhanced sentence is imposed as "a direct consequence of that uncounseled conviction. Id. at 227, 100 S.Ct. at 1588, 64 L.Ed. 2d at 174.

In State v. Sweeney, 190 N.J. Super . 516 (App. Div.1983), we considered whether any of the opinions in

Baldasar apply to a defendant convicted as a second offender under N.J.S.A. 39:4-50, but whose enhanced penalty involved a noncustodial term. We concluded:

> [n]one of the views expressed by the justices precludes using the present defendants' prior convictions to impose enhanced noncustodial penalties for a second driving under the influence conviction. [Id. at 523; emphasis in original].

Here defendant faces a custodial term from 2 to 90 days as a second offender under the present statute. See N.J.S.A. 39:4-50(a)(2). However, N.J.S.A. 39:4-50(a) affords the trial court the option of permitting a defendant, as a second offender, to the option of permitting a defendant, as a second offender, to serve the term at an Intoxicated Driver Resource center instead of the county jail. There may at least be a question as to whether the two days of treatment at the center constitutes a "custodial term." Thus, Sweeney's reasoning that no Sixth Amendment right is implicated may still apply.

However, aside from Sixth Amendment considerations, we agree with Judge Haines that State law bars use of the prior conviction for purposes of imposing an enhanced term under N.J.S.A. 39:4-50. Our Supreme Court in Rodriquez v. Rosenblatt, et al, supra, held that:

> ....as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost. (58 N.J. at 295; emphasis supplied).

Citing the Rodriquez public policy consideration, we held in Sweeney that "where a defendant is in danger of

incurring a substantial loss of driving privileges as a result of an alleged motor vehicle violation, he is entitled to counsel." 190 N.J. Super. at 524. We made no distinction between indigent and non-indigent defendants. See also Beckworth, et al, v. N.J. State Parole Bd., 62 N.J. 348, 365 certif. den. 63 N.J. 583 (1973). Indeed, R. 3:27-2 provides that:

> [e]very person charged with a non-indictable offense shall be advised by the court of his right to retain counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of his right to have counsel assigned without cost. (Emphasis supplied).

In our view, a municipal court's failure to adhere to either the public policy pronounced in Rodriguez or the mandate of R. 3:27-2 disqualifies the State's use of the 1982 uncounseled conviction for enhancement purposes. Without adherence to Rodriguez and R. 3:27-2 disqualifies the State's use of the 1982 uncounseled conviction for enhancement purposes. Without adherence to Rodriguez and R. 3:27-2, the prior conviction is not sufficiently reliable to trigger the severe sanctions under the enhancement statute. Defendant's prior uncounseled conviction does not become "more reliable merely because [he] has been validly convicted of a subsequent offense".Baldasar v. Illinois, supra, 446, U.S. at 228, 100 S.Ct. at 1588, 64 L.Ed. 2d at 175, (Marshall, J. concurring). Our recent opinion in State v. Carey, 230 N.J. Super. 402 (App. Div. 1989) is in accord. As we stated in Carey, "[t]he policy

embodied in Rodriguez and R. 3:27-2 would have no meaning or impact if our conclusion were otherwise." Id. at 409.[5]

Sweeney properly places the burden of proving the lack of legal representation at the time of the first conviction upon the defendant. 190 N.J. Super. at 525-526; see also State v. Carey, supra, 230 N.J. Super. at 409-10; State v. Regan, 209 N.J. Super. 596, 606 (App. Div. 1986); State v. Bowman, 135 N.J. Super. 210, 211 (App. Div. 1975). Here, there is no question that defendant met that burden by giving uncontradicted testimony under oath that he entered a guilty plea to the 1982 offense without counsel and without being advised of his right to retain counsel as required by R. 3:27-2. In fact, the prosecutor conceded at the time of sentencing, in view of defendant's testimony, that defendant should be sentenced as a first offender.

We cannot presume, without some contravailing proofs presented by the State, that simply because R. 3:27-2 requires the court to advise a defendant of his right to counsel, the municipal judge did so. Nor can we conclude, particularly since the trial court accepted defendant's testimony as believable, see State v. Johnson, supra, 42 N.J. at 161 that defendant perjured himself in testifying that he did not know of his right to counsel in 1982. We therefore agree with the trial court that the 1982 conviction cannot be used for enhancement purposes.

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5. In State v. McGrew, 127 N.J.Super. 3237 (App.Div.1974), we affirmed a three-month jail term imposed upon a second offender under N.J.S.A. 39:4-50(a) despite the fact that defendant, at the time of his first conviction, was indigent and uncounseled. However, McGrew is distinguishable since their defendant's first conviction was prior to Rodriguez . see 127 N.J. Super. at 329 and we observed "there is nothing in Rodriguez to suggest an intent that the holding should apply retroactively". Ibid.

We are mindful of the State's assertion that it may have difficulty producing records of counsel representation in prior convictions. Sound recordings and stenographic records of proceedings in municipal courts are kept for only three years. See R. 7:4-5(a). However, the difficulty may be resolved by noting hereafter compliance with R. 3:27-2 and Rodriguez in the record of conviction.

Affirmed.

STATE OF NEW JERSEY V. DAVID LAURICK
DEFENDANT.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION BURLINGTON COUNTY

DECIDED AUGUST 17, 1987

Terri-Anne Duda, Assistant Prosecutor for the State (Stephen G. Raymond, Burlington County Prosecutor).

Jay G. Trachtenberg for Defendant.

HAINES, A.J.S.C. (Sitting as Municipal Court Judge)

The defendant Laurick was convicted by a municipal court of driving while intoxicated. He has now been convicted of the same offense a second time. N.J.S.A. 39:4-50(a)(2) provides:

> $500.00 nor more than $1000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction....

Laurick opposes the imposition of the enhanced penalty, arguing that the first conviction should not be consid-

ered for that purpose since he was not then represented by counsel. Evidence was received with respect to that claim. Laurick testified that he not only lacked counsel when convicted but also that he had not been advised of his right to counsel and had made no knowing waiver of that right. The State presented no contradictory evidence.

[1-3] The rule for which the defendant contends is the law of this state. A prior conviction of a non-indictable offense may not be used for sentence enhancement purposes when (1) the punishment for that offense was a "consequence of magnitude"; (2) the defendant was not represented and (3) there was no intelligent waiver of counsel. The rule has evolved from the New Jersey Supreme Court's opinion in Rodriguez v. Rosenblatt, 58 N.J. 281 (1971), in which the Court said:

> [A]s a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.
>
> [W]henever the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood on conviction, the indigent defendant should have counsel assigned to him unless he chooses to proceed pro se with his plea of guilty or his defense at trial. [at 295]

A substantial loss of driving privileges is a "consequence of magnitude." State v. Sweeney, 190 N.J. Super. 516, 524 (App. Div.1983) Prior appellate opinions on the subject, while discussing the rule, have not applied it. They require analysis.

State v. Bowman, 131 N.J.Super. 209, aff'd. 135 N.J.

Super. 210 (App. Div.1975), suggested the rule. Bowman was twice convicted of driving a motor vehicle without insurance coverage. The second conviction mandated imposition of a three-month prison term and revocation of the defendant's driving privileges for two years. The Bowman court said:

> Supplementing the opinion, we find no basis for the claim raised for the first time in the County Court and again urged on this appeal, that defendant's conviction as a second offender is void because the State failed to prove he knowingly waived his right to counsel when he pleaded guilty in the Brielle Municipal Court. Certification by the judge of that court, submitted following an order enlarging the appellate record, clearly shows that defendant was advised of his right to counsel and knowingly waived it before he pleaded guilty.[at 211]

State v. Garcia, 186 N.J.Super. 386 (Law Div.1982), addressed the issue squarely in a criminal setting. Garcia involved a defendant who pleaded guilty to third degree burglary. He had prior convictions of one or more non-indictable offenses in connection with which he was not represented by counsel. The court, citing decisions of the United States Supreme Court, held that an uncounseled prior conviction could not be used to enhance punishment. It quoted from Justice Marshall's opinion in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed. 2d 169 (1980), in which the Justice thought it "plain that petitioner's prior uncounseled misdemeanor conviction could not be used collaterally to impose a term of imprisonment upon a subsequent conviction." [at 226, 100 S.Ct. at 1587].

State v. Sweeney involved two defendants twice convicted of drunk driving. Both were sentenced by the

municipal court as second offenders. They were fined and their licenses were revoked for periods of two and three years. They did not receive prison terms. The Superior Court, Law Division, decided they should have been sentenced as first offenders because their prior convictions had been uncounseled.

The Appellate Division reversed and reinstated the municipal court sentences. The Court noted that the defendants, in connection with their first conviction, had no right to counsel under the Sixth and Fourteenth Amendments to the federal Constitution because they had not been sentenced to prison. 190 N.J. Super. at 520. It analyzed Baldasar, noting that it was a case without a majority opinion, and said:

> None of the views expressed by the justices precludes using the present defendants' prior convictions to impose enhanced noncustodial penalties for a second driving under the influence conviction. [at 523]

The Court found, however, that State law required a different result. Rodriguez mandated counsel not only when a defendant faced a jail term but also when he faced the loss of driving privileges. Consequently, on proper proofs, the prior uncounseled convictions of the defendants in Sweeney should not have provoked an enhanced sentence. The rule was not applied, however, because the defendants' burden of proving the lack of counsel had not been carried. The municipal court sentences were therefore reinstated.

State v. Regan, 209 N.J.Super. 596 (App.Div.1986), provides a like analysis of Sweeney . It held that a conviction of drunk driving in New York was properly considered for sentence enhancement purposes. Regan failed to convince the Court that he did not waive counsel

at the time of his New York conviction. The Court said: "... we cannot presume that he could not afford counsel or did not waive his right to retain counsel there". [at 606] Had defendant carried the burden of proof, it appears that his New York conviction would not have been admissible for enhancement purposes.

[4,5] In the present case, Laurick had the burden of proving the absence of counsel when he was first convicted. He carried that burden through his own testimony. Consequently, his first conviction may not be considered for sentence enhancement purposes.

BURLINGTON COUNTY SUPERIOR COURT
STATE OF NEW JERSEY
DOCKET NO.: T-18755

STATE OF NEW JERSEY:
Plaintiff,

V.
DAVID J. LAURICK
Defendants

TRANSCRIPT OF
RECORDED PROCEEDINGS

Place:
Burlington County Superior Court
County Courts Facility
Mt. Holly, N.J. 08060

Date:
June 22, 1987

BEFORE:

THE HONORABLE MARTIN L. HAINES, JR., J.S.C.

APPEARANCES:
TERRIE-ANNE DUDA, ESQUIRE
ASSISTANT PROSECUTOR

JAY G. TRACHTENBERG, ESQUIRE
ATTORNEY FOR DEFENDANT

PARTY REQUESTING TRANSCRIPT:
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INDEX

WITNESS:	DIRECT	CROSS
David J. Laurick	5	7

	PAGE
The Court - Findings	8

THE COURT: All right. Mr. Trachtenberg, let's take Laurick.

MR. TRACHTENBERG: Good morning, Your Honor.

THE COURT: Would you both enter your appearances, please, in State against Laurick?

MS. DUDA: Terrie Duda, Assistant County Prosecutor, on behalf of the State, Your Honor.

MR. TRACHTENBERG: My name is Jay Trachtenberg, Your Honor. I appear on behalf of the defendant, David Laurick. Does...

THE COURT: All right. We here for sentencing, and I assume you have an argument about a prior conviction, Mr. Trachtenberg.

MR. TRACHTENBERG: Yes sir, I do. As I intimated at our last appearance, Mr. Laurick apparently was charged with a similar offense on a prior occasion. I wanted an opportunity to obtain for the Court satisfaction, that I believe perhaps would be necessary from the standpoint of my burden of proof, that in fact Mr. Laurick was not represented by counsel and that there is nothing on record to indicate to the contrary. I have furnished the Court with the certification of Anita Stevens who is the court clerk in the Plumsted Township Municipal Court.

THE COURT: I have it and I've read it. I think you need more than that, however.

MR. TRACHTENBERG: Yes.

THE COURT: This is Mr. Laurick?

MR. TRACHTENBERG: Yes, sir, it is. I will represent to you...

THE COURT: Well, I think he -- I think he needs to testify as to what he did in -- at the prior hearing. That is what he was advised or whether he intelligently waived counsel. That's pretty much it. Can we put him on for that purpose?

MR. TRACHTENBERG: Judge, I am familiar with the Plumsted Township Municipal Court. My office is directly across the street. I know Judge Supple. I appear there on a regular basis. I know what his procedure is and what it was.

THE COURT: No, Mr. Trachtenberg.

MR. TRACHTENBERG: I'm not going - - I'm not going to testify.

THE COURT: All right.

MR. TRACHTENBERG: I simply want to suggest to Your Honor that customarily Judge Supple delivers opening remarks. Only on rare occasions, and I mean...

THE COURT: Yeah, but I can't -- I can't accept that as evidence; can I, Mr. Trachtenberg?

MR. TRACHTENBERG: No, sir.

THE COURT: And I think the cases are clear we have to know, and the burden is on Mr. Laurick.

CLERK: Right here please, sir. Raise your right hand and put your left hand on the Bible, state your name in full to

the Court.

MR. LAURICK: My name is David J. Laurick.

CLERK: Spell your last name, please.

MR. LAURICK: L-A-U-R-I-C-K.

DAVID J. LAURICK, HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

CLERK: Be seated please and keep your voice up.

DIRECT EXAMINATION BY MR. TRACHTENBERG:

Q. Mr. Laurick, were you charged with driving under the influence of alcohol once before?

A. Yes, I was.

Q. Did you receive that ticket in Plumsted Township, which is New Egypt?

A. Yes, I did.

Q. Did you appear in court?

A. Yes, I did.

Q. When you appeared in Court, did you have an attorney?

A. No, I didn't.

Q. Did you know that you had an absolute, positive right to have an attorney?

A. No, I didn't.

THE COURT: May we find out what the judge told him?

Q. Do you recall what -- do you appear in court -- strike that. What, if anything, did the judge tell you when you stepped up for purposes of entering your plea and for the purpose of being sentenced?

A. Well, I just entered a guilty plea, and he didn't advise me of -- that I had the right to an attorney. I just figured I'd take my six months and go down the road.

Q. All right.

A. And he didn't explain the further consequences in the future.

Q. Did you know what would happen at that time if you were charged a second time?

A. No, I didn't.

Q. Did you know what would happen if you were charged a third time?

A. No, I didn't.

Q. Did you know what would happen if you got behind the wheel of a car and drove during that six-month period of suspension?

A. Yes, I did.

Q. Did you know that you'd be on the revoked list?

A. Yes, I did.

Q. Okay. But did you know what the penalty would be?

A. No, I didn't.

Q. Did you know that if you had an accident while driving while you were on the revoked list that you would have to go to jail for 45 days?

A. No sir, I didn't.

Q. Did you know that there was a $500 fine for driving on the revoked list?

A. No, I didn't.

Q. Did you know that the judge could take your license for an additional period of time up to six months?

A. No, I didn't.

Q. Did you know he could also send you to jail if he wanted to?

A. No, I didn't. No, I didn't.

THE COURT: Cross-examine.

CROSS-EXAMINATION BY MS. DUDA:

Q. Mr. Laurick, do you remember the day you got that ticket?

A. No, ma'am, I don't. It was '82. That's all I can tell you.

Q. And how many times did you appear in court on that ticket? Was it just once or was it more than once?

A. Just once. I entered a guilty plea.

MS. DUDA: I have no other questions, Your Honor.

THE COURT: All right. You may step down, Mr. Laurick.

All right. Mr. Trachtenberg, I think we can take the position from that testimony that Mr. Laurick did not make a knowing waiver of counsel and didn't have one. Do you -- can you read that in any different way, Miss Duda?

MS. DUDA: No, Your Honor. I think under your opinion in Bitzer (phonetic) that we would have to sentence the defendant as a first offender.

THE COURT: Well, there's some nice twists and turns. I'm inclined to believe so as well, but we have two cases to jump, and I think I ought to state my position on the record. My opinion in Bitzer, never published, did hold that in this kind of a situation, uncounseled prior conviction, with the defendant discharging the burden of proving that he was uncounseled and that he made no knowing waiver of counsel, that in such a situation we will not consider the prior conviction for the purpose of an enhanced sentence. Now, there have been two cases in the Appellate Division dealing with the subject. One is State against Sweeney, which was decided in 1983. It's 190 N.J. Super 516. And Sweeney indicates that if the defendant, in fact, did not go to prison on the first conviction and is not about to go to prison on the second conviction, that he may be treated as a second offender. Of course, in this case, a second offense would send him

to prison, I think. No, it wouldn't either.

MR. TRACHTENBERG: Yes, it does, sir.

THE COURT: That's right. Second violation...

MS. DUDA: Forty-eight hours, Your Honor.

MR. TRACHTENBERG: There's a man -- there's a man...

THE COURT: Imprisonment. Yeah, it is imprisonment. I was thinking it was only the Driver's Resource Center. All right. So, he would...

MR. TRACHTENBERG: That's an alternative, sir.

THE COURT: So he would, number one, be subjected to that, and number two, as I read Sweeney, it turned in part on that fact that the defendant failed to discharge his burden of proving that there had been no intelligent waiver of counsel. Aside from that, I am obliged to say I disagree with Sweeney . Sweeney talks about the risk of imprisonment and reads Baldasar, the United States Supreme Court case on the subject, as permitting the use of the prior conviction provided there's been no imprisonment. I don't think Baldasar says that. I think that when we link that with Rodriguez, we're obliged to consider not only imprisonment but other consequences of magnitude. And I think, although I really didn't quite piece it out, I think that Rodriguez -- let me see -- was held not to apply. I don't know why. It doesn't make sense. Decided long before Sweeney, of course. Well, I won't try to dissect that, but in any event, for the reasons I've just suggested, I don't think Sweeney applies. And then we come to State against Regan, 209, N.J. Super 596, Judge Stern's 1986 case. And in that Sweeney is acknowledged, but again

--but not followed, as I see it, neither rejected nor followed, and repeats pretty much the same points that I have just recited. But it seems to me that -- it seems to me that Regan does not dictate a contrary result. It winds up at one point, for example, on page 606, saying, we cannot presume -- this is the Regan defendant -- cannot presume that he could not afford counsel or did not waive his right to retain counsel therein. So, again, there was a failure to prove the waiver. The contrary is true here. So, for those reasons, I will sentence Mr. Laurick as a first offender and will impose -- well, do you wish to be heard on the sentence, Ms. Duda? And, of course, Mr. Laurick may be heard as well.

MS. DUDA: No, Your Honor. As you are aware, I'm filling in for Mr. Futey, and his position was minimum penalties.

THE COURT: I assume you don't argue against that, Mr. Laurick?

MR. TRACHTENBERG: No, sir, I do not.

THE COURT: Mr. Laurick wish...

MR. TRACHTENBERG: He's aware of the consequences.

THE COURT: All right. Then I will impose the minimum penalties which are a $250 fine, 12 hours in the Driver Resource Center, doing two consecutive days, not less than six hours each day. I will not impose a term of imprisonment. Mr. Laurick must forfeit his license for a period of six months.

MR. TRACHTENBERG: Judge, in addition, just for your edification, there is a $100 surcharge that you must impose, and I believe for the trouble to which I have put

North Hanover Township, customarily, there's $15 costs as well.

THE COURT: Yes. I would allow that -- the cost figure, and I would advise Mr. Laurick of the $100 surcharge.

MS. DUDA: Your Honor...

THE COURT: And I think there's another warning we normally make about driving on the revoked list.

MR. TRACHTENBERG: Judge, I'll -- with the Court's permission, I will assume that obligation. I will represent to you on the record that as soon as I leave the courtroom, I will advise Mr. Laurick of the consequences of yet a second or third drunk/driving offense, and I will also advise Mr. Laurick of the consequences of either a first, second or third offense for driving on a revoked list together with any complications that may arise therefrom as a result of the underlying conviction for driving under the influence of alcohol or the potential in the event that there's personal injury either to Mr. Laurick or someone else. Normally, there's a form that's signed.

MS. DUDA: Excuse me. Your Honor, I believe Mr. Futey provided you with that form, and you and the defendant are supposed to sign it. Did he give you that form?

THE COURT: Thank you. If he did, I don't have it with me. I don't know if there's any rule that requires that. It's simply a matter of creating a record--...

MR. TRACHTENBERG: It's a matter of policy, sir, exactly.

THE COURT: ...creating a record; isn't it.

MR. TRACHTENBERG: Yes.

THE COURT: All right. Since I don't have it and since I see no reason to delay everything while we're running around to get it, I will accept your representation, Mr. Trachtenberg, as binding upon Mr. Laurick and as satisfying any requirement with respect to that advise.

MR. TRACHTENBERG: If you want to, sir, I'll do it on the record. It's up to you.

THE COURT: Go ahead.

MR. TRACHTENBERG: Mr. Laurick, I want you to be aware that if you are accused and convicted of driving under the influence of alcohol again, you would be considered a second offender. If convicted of a second offense, you would be subject to a fine of $500 to $1,000. You would be subject to loss of your driving privilege for a period of time up to two years. You would be subject to the $100 surcharge. you would be subject to community service of 30 days. You would have to serve two days in a IDRC program, and there is a potential for imprisonment.

You would also lose your license for a period of two years. If you are convicted on a third occasion, you are subject to six months in jail. You are subject to a $1,000 fine. You are subject to ten years loss of your driving privileges. Do you understand that?

MR. LAURICK: Yes, I do.

MR. TRACHTENBERG: Do you understand that if you drive during the period of any revocation that as a first offender you will lose your license for up to six months, and you will suffer a fine of up to $500?

MR. LAURICK: Yes, sir.

MR. TRACHTENBERG: If you are convicted on a second occasion for driving on the revoked list, you are subject to a $750 fine and up to six month loss of your driving privileges together with a period of imprisonment up to five days. Are you aware of that, sir?

MR. LAURICK: Yes, I am.

MR. TRACHTENBERG: As a third offender for driving on the revoked list, you are subject to a $1,000 fine and ten days in jail and a period of revocation up to six months. Are you aware of that?

MR. LAURICK: Yes. I am.

MR. TRACHTENBERG: I also wish to advise you that if you are on the revoked list because of this or another drunk driving offense, there is additional one to two years loss of your driving privileges and a potential jail sentence in addition thereto. Do you understand that?

MR. LAURICK: Yes, I do.

MR. TRACHTENBERG: I also want you to know, sir, that if you are involved in an accident while you are driving on the revoked list, that there is a mandatory 45 day jail sentence even if you are not in fault -- not at fault and even if you are the one who is injured. Do you understand that?

MR. LAURICK: Yes, I do.

MR. TRACHTENBERG: Judge, I believe that that constitutes the notice obligation.

THE COURT: I think you done it very competently and clearly. Now that you have, I've discovered the form.

MR. TRACHTENBERG: I'll have him sign it, Judge.

THE COURT: It was folded in with the summons.

MR. TRACHTENBERG: Just I don't -- I don't want you to run afoul over the bureaucracies, so I will have him sign it.

THE COURT: Do have him sign it and our clerk will send it back.

MR. TRACHTENBERG: There's but one remaining request, sir, and that is would the Court please stay the imposition of the fine, the costs, the suspension of the license, the $100 surcharge? There is going to be an appeal from the various and sundry, rather novel, issues that have been presented from time to time throughout the course of these proceedings.

THE COURT: All right. If you'll present an appropriate order, I'll stay it...

MR. TRACHTENBERG: I will do that, sir.

THE COURT: ...for the purpose of appeal only. All right? That is to say if the appeal isn't taken, obviously, the stay will expire.

MR. TRACHTENBERG: Judge, just so that I don't get myself embroiled in a -- in a problem with the Appellate Division or the Attorney General or the municipal prosecutor, so that I understand these proceedings, you are sitting as a Superior Court Judge and you undertook

jurisdiction of the full matter; is that correct?

THE COURT: I think I'm sitting as a Municipal Court Judge who took full jurisdiction of the matter.

MR. TRACHTENBERG: The reason I ask is...

THE COURT: Yes, it presents a problem, and we ought to have some solution to it. It's silly for you to appeal my munic -- my decision as a Municipal Court Judge to ...

MR. TRACHTENBERG: Another...

THE COURT: ...me, for example, as a Superior Court Judge.

MR. TRACHTENBERG: There's also a very practical difference from my point of view, because as a -- if it's a Municipal Court decision, it imposes a 20 day time frame upon me, and of course, I can't go directly to the Appellate Division. I have to go to the Superior Court Law Division. If you say, on the other hand, which I believe we have all assumed, that you are sitting as a Superior Court Judge who took jurisdiction of the Rule Eight and then, subsequently, the entire matter, then, of course, this would -- this would now constitute everything that you've done up to this point would constitute final decisions of a Superior Court Law Division Judge, which would then entitle me or allow me, if the Appellate Division, and of course, then there's a 45 day time period.

THE COURT: Well, then I'll solve it for you, but let's hear from Ms. Duda, if you have any thoughts.

MS. DUDA: Judge, I have a similar case pending where the trial de novo for a case was heard in Superior Court,

because there was a conflict in the municipal court. Mr. Wherry was the defense counsel in that case, and he subsequently took an appeal. He filed both with the Superior Court here, and he filed with the Appellate Division. And when I discussed the matter with the team leader attorney in the Appellate Division, he wasn't sure what the appropriate place was to file either. I think it would be the Appellate Division since Your Honor already is a Superior Court Judge. It would make no sense to ship it to another Superior Court Judge.

MR. TRACHTENBERG: I think that there...

THE COURT: Of course not, and I'm going to solve it this way. Mr. --- if you'll let me interrupt for a minute. Mr. Polino, do you have that conference with Judge Wells this morning?

MR. POLINO: So I understand, Judge.

THE COURT: All right. If you don't mind waiting a few minutes, I will take it.

MR. POLINO: All right. I'll just wait outside.

THE COURT: Fine.

MR. TRACHTENBERG: Judge, did ...

THE COURT: But I -- if you will submit an order which memorializes this decision, very briefly, I'm not talking about anything elaborate -- and then further provides that that decision was further appealed to me, to the Superior Court, if you wish, and that the same finding was made,...

MR. TRACHTENBERG: I was just going to say. I could

furnish ...

THE COURT: ... I think -- I think you will then -- I think you will then have a decision from the Superior Court, and you'll have 45 days to appeal. All right?

MR. TRACHTENBERG: I can -- I can also add to that, if you want me to, by furnishing you with a waiver of his right to appeal de novo from you to you. That was another thought that I had.

THE COURT: I'm not -- yeah, I'm not sure that you have a basis for that legally. You're better off.

MR. TRACHTENBERG: I'll provide any order that is -- that is -- that...

THE COURT: ...covering the technicality by saying that you have appealed. I'll acknowledge it. I will make the same finding, and you can go on your way.

MR. TRACHTENBERG: And now, another procedural question, to whom do I submit the order either for consent or under the five-day rule? Shall I submit it to the Burlington County Prosecutor or the Municipal Prosecutor?

THE COURT: Miss Duda, No, Miss Duda.

MS. DUDA: Your Honor, I would prefer, since the Attorney general's Office had such a big interest in the case, that the order be served upon either Stephen Monson or George Ciszak.

THE COURT: All right. Let's send it to both.

MR. TRACHTENBERG: I'll send it to all three. That way I...

THE COURT: Mr. Monson -- Mr. Futey is gone. He was confirmed as...

MR. TRACHTENBERG: Oh.

THE COURT: So there's no point in giving him any kind of a notice. Stephen Monson, Miss Duda will suffice. All right?

MR. TRACHTENBERG: What's your first name?

MS. DUDA: Terrie.

MR. TRACHTENBERG: Thank you sir.

THE COURT: Okay.

CERTIFICATION

I, Carol Lynn, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of the State of New Jersey v. David J. Laurick, heard on June 22, 1987, in the Burlington County Superior Court and recorded on Tape No. 1, Index No. 53 to 1032, of that Court.

/s/ Carol Lynn

_____

CAROL LYNN

WITNESS:

/s/ Diana Doman

_____

DIANA DOMAN

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions --- Provisions concerning --- Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.